ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION II

CA 07-666

February 13, 2008

DAVID EZELL

APPELLANT

APPEAL FROM THE UNION COUNTY CIRCUIT COURT
[NO. DR-2004-271-6]

V.

HONORABLE DAVID GUTHRIE, JUDGE

BRITTANY EZELL

APPELLEE

AFFIRMED

This is a dispute over child support. Appellant David Ezell appeals from an order reducing his child support payments but granting appellee Brittany Ezell judgment in the amount of $2,250 for a child-support arrearage. Appellant raises five issues on appeal, contending that the trial court erred: (1) by prematurely hearing appellee's counter-petition for contempt; (2) by imputing an income to him of $500 a week; (3) by modifying the amount of child support effective the date of the hearing, rather than as of the time he filed the petition to reduce support; (4) in finding that the arrearage in child support was $2,250; and (5) by denying his motion in limine. We find no error and affirm.

The parties were divorced in November 2004, and the decree ordered appellant to pay $125 a week in child support for their daughter. On January 9, 2006, appellant filed

a motion to decrease his child support payments, alleging a reduction in income as changed circumstances. The motion was ultimately scheduled to be heard on January 26, 2007. Prior to the hearing date, on January 8, 2007, appellee filed a counter-petition for contempt alleging that appellant was delinquent in his payment of child support. At the January 26 hearing, the trial court heard both petitions and issued a letter opinion announcing its decision on February 28. Because appellant had only been sporadically employed since 2004, the trial court imputed an income to him of $500 a week, or $26,000 a year, which yielded a chart amount of $96 a week. The trial court thus granted appellant's motion to reduce his child-support payments to that amount, effective as of the date of the hearing. The trial court did not hold appellant in contempt, but it found that there was an arrearage of $2,250 and granted appellee judgment for that amount.

Appellant's first argument is that the trial court erred by entertaining appellant's motion for contempt. At the hearing, appellant objected to the trial court taking up that motion because it had not been filed twenty days in advance of the hearing. Although appellee had no objection to continuing the contempt motion to a later date, the trial court ruled that it would be more efficient to hear both motions at once because each concerned the issue of child support in terms of whether there was an arrearage, and if so, whether the failure to pay was willful, and whether appellant had experienced a reduction in earnings such that modification was warranted. On appeal, appellant contends that it was error for the trial court to hear the motion when it had not been filed twenty days before the hearing; that he did not have a reasonable time to prepare; and that hearing the motion deprived him

of due process.

Rule 6(c) of the Arkansas Rules of Civil Procedure provides that a written motion and notice of the hearing shall be served not later than twenty days before the time specified for the hearing. The rule further states that this time period may be modified by the trial court. Thus, the rule allows the trial court discretion in the matter. In addition, a trial court has an obligation to manage and control its docket in an efficient manner. *Odaware v. Robertson Aerial-AG, Inc.,* 13 Ark. App. 285, 683 S.W.2d 624 (1985). It is well-accepted that the trial court controls the docket, and the effective control of the docket is a matter for the trial judge. *Johnson v. Davis,* 315 Ark. 199, 866 S.W.2d 384 (1993).

While appellant was entitled to reasonable notice of the issues to be heard, *Estes v. Masner,* 244 Ark. 797, 427 S.W.2d 161 (1968), we are not convinced that he was deprived of reasonable notice. Appellant was aware of the motion eighteen days before the hearing and knew that it involved issues related to his motion for modification. Although appellant claims otherwise, error is no longer presumed to be prejudicial; unless the appellant demonstrates prejudice, this court will not reverse. *Lucas v. Grant,* 61 Ark. App. 29, 962 S.W.2d 388 (1998). Appellant has failed to make any offer of what, if any, additional evidence would have been presented at a later hearing. And, the record does not indicate that appellant was unprepared to defend the motion. We thus find no abuse of discretion. We need not speak further of appellant's due-process argument, because it is being raised for the first time on appeal. Even arguments of constitutional dimension must be argued below if they are to be preserved for appeal. *Irvin v. Irvin,* 47 Ark. App. 48, 883 S.W.2d

862 (1994).

As his second point, appellant argues that the trial court erred by imputing an income to him of $500 a week. The testimony revealed that appellant worked in the telecommunications field and that at one time he earned $90,000 to $100,000 a year. However, he lost his high-paying job in 2004 and since that time was performing only temporary, contract work. His tax returns showed that he earned $37,325 in 2004 and $41,080 in 2005. In 2006, appellant earned $19,215 working at Teksystems, Inc., and $7,266 working at Maya Telecom, Inc. He also received $8,704 in unemployment compensation. Appellant was awaiting one more pay stub from Maya Telecom as of the time of the hearing.

Appellant testified that he had earned as much as $450 a day when he was working abroad, but he no longer wanted to work extended periods outside of the United States because of his daughter. He said he had been trying to find local employment on a daily basis but that it had been difficult to find a steady job in his occupation. Appellant also testified that he had been in training to drive trucks and that he was scheduled to take a test in two weeks in order to obtain a CDL license.

At the conclusion of the hearing, appellant's counsel argued that the evidence showed appellant had net earnings of $26,000 in 2006 and that according to the chart appellant would owe $96 a week in support. Counsel asked that appellant's support obligation be reduced for that year to that weekly amount and that it be set for the upcoming year at the imputed minimum wage of $6.25. The trial court apparently accepted

appellant's calculation of his expendable income from the previous year and concluded that it was a proper basis upon which to set support.

We review child-support awards de novo on the record. *Davie v. Office of Child Support Enforcement,* 349 Ark. 187, 76 S.W.3d 873 (2002). The amount of child support lies within the sound discretion of the trial judge, and the trial judge's findings will not be reversed absent an abuse of discretion. *McKinney v. McKinney,* 94 Ark. App. 100, 226 S.W.3d 37 (2006). Further, we give due deference to the trial judge's superior position to determine the credibility of the witnesses and the weight to be accorded their testimony. *Williams v. Nesbitt,* 95 Ark. App. 79, 225 S.W.3d 389 (2006).

In child-support cases, it is the ultimate task of the trial judge to determine the expendable income of a child-support payor. *Stuart v. Stuart,* 99 Ark. App. 358, ___ S.W.3d ___ (2007). It has also been held that there are circumstances under which it is appropriate to order child support based on a party's earning capacity rather than on actual earnings. *Grady v. Grady,* 295 Ark. 94, 747 S.W.2d 77 (1988); *Irvin v. Irvin, supra.* A trial court's decision on whether to impute income must be based on the facts and circumstances of each case. *Grady v. Grady, supra.*

Here, despite the lack of consistent employment, appellant demonstrated the ability to earn $37,325 in 2004, $41,080 in 2005, and at least $35,185 in 2006. The trial court found that appellant was capable of earning at least $500 a week, or $26,000 a year. We cannot say that this decision represents an abuse of discretion.

Next, appellant argues that the trial court erred by failing to make the reduction in

child support effective retroactively to the date he filed the petition. We disagree.

Arkansas Code Annotated section 9-14-107(d) (Supp. 2005) provides that any modification of a child support order that is based on a change in gross income of the non-custodial parent shall be effective as of the date of filing a motion for increase or decrease in child support, unless otherwise ordered by the court. The trial court thus has discretion in making this decision; a retroactive award is not mandatory. *Stepp v. Gray,* 58 Ark. App. 229, 947 S.W.2d 798 (1997). The record in this case holds evidence that the payment of child support was not always a priority for appellant. While he was accumulating the arrearage, appellant continued to have his hair cut once a week, and he remained current on other debts, including a monthly $313 payment on a loan for a twenty-two foot boat. The trial court could also find that appellant had been sporadically employed for a period of several years and that perhaps he was not using his best efforts to find stable employment. There was no abuse of discretion.

The fourth issue appellant raises is the contention that the trial court erred in finding that he had accumulated an arrearage of $2,250. Appellee testified that the arrearage was that amount. Appellant testified that he was behind only $1,850 after taking into account the extended period of time the child spent with him in the summer. In rebuttal, appellee testified that appellant had not exercised extended visitation the previous summer.

On the issue of child support, a trial court may provide for a partial abatement or reduction of the stated child-support amount for any period of extended visitation with the non-custodial parent. Ark. Code Ann. § 9-14-106(a)(2)(A) (Repl. 2002). Administrative

Order No. 10 also speaks to this issue and states that a court should consider whether an adjustment is appropriate where the child spends in excess of fourteen consecutive days with the non-custodial parent, but not to exceed 50% of the child-support obligation. Paragraph five of the decree granted extended summertime visitation of two weeks in June and two weeks in July. Paragraph seven provided:

> If support obligation is current, support shall abate by 50 percent during the visitation set out under paragraph (5). If support is not current, the 50 percent which would have been abated shall be paid and shall apply to the arrearage.

Although appellant claimed that the child stayed with him for two consecutive weeks, appellee disputed that testimony. The trial court credited appellee's testimony, and we can find no abuse of discretion in doing so, because it was the trial court's prerogative to resolve the conflicts in the testimony. *Williams v. Nesbitt, supra.*

As his last point on appeal, appellant contends that the trial court erred in denying his motion in limine. Prior to the hearing, appellant propounded interrogatories to appellee in reply to her motion for contempt. In them, he asked her to list her witnesses and to describe the nature and substance of their testimony. Appellee named herself as the only witness, but did not otherwise elaborate on her proposed testimony. Claiming that the answer was incomplete, appellant moved in limine to exclude appellee's testimony at the hearing. The trial court denied the motion, and appellant claims error.

In response to appellant's argument, appellee contends that Ark. R. Civ. P. 26 does not require her to disclose the substance of her testimony. We need not decide that larger

issue because we conclude that the trial court did not err by refusing to exclude appellee's testimony under the circumstances in this case. The imposition of sanctions rests within the trial court's discretion and will not be overturned absent an abuse of discretion. *Pennino v. Walthall,* ___ Ark. App. ___, ___ S.W.3d ___ (Apr. 12, 2006). The trial court did not grant appellant's motion in limine because it found that the substance of appellee's testimony was patently obvious in that it would be geared toward the arrearage in child support. Also, in response to another interrogatory, appellee estimated appellant's accrued arrearage and stated how she arrived at that amount. We agree with the trial court's assessment of this issue and can find no abuse of discretion.

Affirmed.

GLADWIN, J., agrees.

ROBBINS, J., concurs.